89-175

No. _____

Supreme Court, U.S.
FILED
JUL 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

PAUL EVANS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) Does the trial court have a duty to advise a criminal defendant of his right to testify or remain silent when the trial record expressly states that defendant's counsel has not fully advised defendant of this right?

(2) If the trial court has no duty to advise a criminal defendant as to his right to testify or his right to remain silent, does the trial court have a duty to voir dire a criminal defendant regarding his understanding of his right to testify or the right to remain silent, or order defense counsel to advise defendant of his rights when the trial record expressly states that defendant's counsel has not fully advised defendant of this right?

(3) Does a trial court have a duty to advise a criminal defendant of his right to counsel when during trial the defendant moves to discharge his attorney and when the trial court issues an equivocal ruling denying defendant's motion while granting the defendant sole control over his case against the wishes of his attorney.

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PETITIONER, Paul Evans, petitions for a Writ of Certiorari to review the decision of the Court of Appeals for the Ninth Circuit, entered May 9, 1989, affirming the conviction of the lower court.

OPINIONS BELOW

A copy of the unpublished opinion of the United States Court of Appeals for the Ninth Circuit is attached at appendix A.

JURISDICTION

The judgment of the United States District Court for the Western District of the State of Washington was entered on February 11, 1988. A notice of appeal was timely filed with the United States Court of Appeals for the Ninth Circuit on February 19, 1988. The decision of the United States Court of Appeals was entered on May 9, 1989. Petitioner acknowledges that this Petition for a Writ of Certiorari has been filed outside the sixty day time period. However, in light of the fact that this is a criminal case, Petitioner requests that the Court exercise its power to waive the sixty day deadline since it is set by court rule as opposed to statute.

The United States Supreme Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution, provides in pertinent part:

> In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Paul Evans, was convicted of conspiracy to distribute cocaine, distribution of cocaine, and distribution of cocaine in excess of 500 grams. A jury trial was held November 9-12, 1987.

After the government rested, the court asked Petitioner's trial counsel if he was ready to proceed with the

case of the defense. (RP II, 172). In response, Petitioner's counsel stated that he had not had sufficient time to discuss with Petitioner his right to testify or to remain silent. Therefore, Petitioner's counsel requested a recess until the following trial day to evaluate the case of the government and discuss with Petitioner his rights concerning his testimony. (RP II, 172). The court denied his request. (RP II, 173). Without consulting Petitioner, Petitioner's counsel responded that the defense would rest. (RP II, 173) The U.S. attorney suggested to the court that "it would be helpful if the court inquire personally of the consequences of waiving his right to testify." (RP II 173) In response, the Court reasoned "I don't think I have authority to ask the defendant anything." (RP II, 173) Petitioner did not testify on his own behalf.

At the close of the government's case in chief, the Petitioner made a pro se written motion to dismiss his attorney based on ineffective counsel, and Petitioner made a motion for mistrial. (Attached at Appendix B). The trial court denied both motions. Petitioner's counsel then requested that the court allow him to withdraw, but the court denied his request. (RP III, 10).

Following the instructions to the jury, the trial court sua sponte revoked the Petitioner's bail. (RP III, 23). Because there had been no motion before the court to revoke Petitioner's bail, the U.S. attorney made a motion that the Court reinstate Petitioner's bail, but the court denied the prosecutor's motion. (RP III, 25,26).

Before Petitioner was given the opportunity to make a closing argument, Petitioner's counsel renewed his request to withdraw, and the court again denied his

request. (RP III, 53, 54). Thereafter the U.S. Attorney expressed his "fear" about the Court's "direction to the defense counsel to abide by the client's wishes and not make a closing statement when the defense counsel thinks he should." (RP III, 58). Petitioner's counsel requested permission to make a closing argument over Petitioner's objection, which the court denied. (RP III, 60). Neither Petitioner nor Petitioner's counsel gave a closing argument. (RP III, 51-60).

Judgment was entered against the Petitioner on February 11, 1988. On February 19, 1988, Petitioner filed a timely notice of appeal with the clerk of the court of the Western District of Washington. On appeal, the United States Court of Appeals of the Ninth Circuit affirmed the judgment of the trial court.

ARGUMENT

The Fifth, Sixth, and Fourteenth amendments to the United States Constitution have been interpreted to provide the accused a fundamental right to testify at his trial. *Faretta v. California*, 442 U.S. 806 (1975).

> This court has often recognized the Constitutional stature of rights that, though not literally expressed in the documents, are essential to due process. It is now accepted that an accused has a right . . . to testify on his own behalf . . .

Id. at 819, note 15.

The United States Supreme Court has never specifically settled the issue of whether an accused has a constitutional right to testify. However, in *Wainwright v. Sykes*,

433 U.S. 72, 93, N.1 (1977), Chief Justice Burger stated in his concurring opinion that certain "basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make." In support of his statement, Chief Justice Burger cited the A.B.A. standards for criminal justice, The Defense Function (approved Draft 1971) § 5.2, in part as follows:

> (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf.
>
> (b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.

Cited in *State v. Rosillo*, 281 N.W.2d 877 (1979).

Also unsettled is the issue of whether error must be proved in situations in which defense counsel improperly prevents a defendant from exercising his right to testify, or whether denial of this right is, ipso facto, error. *State v. Rosillo, supra* at 879. In *Rosillo*, the court held that "The right to testify is such a basic and personal right that its infraction should not be treated as harmless error." *Id.* at 879. Analogous to the case at bar, Petitioner was effectively denied his right to testify on two bases: Petitioner's counsel expressly stated on the record that he had not effectively advised Petitioner of his right to testify; and, following this ineffective advisement, the colloquy

between the bench and the U.S. Attorney stifled any hope for Petitioner to be advised. (RP II, 172-174).

Not only is the right to testify a fundamental right, but it is a personal right that cannot be waived by counsel. *State v. Rosillo, supra.* In *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) the Court stated that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights."

In the case at bar, following the close of the Government's case in chief, and immediately before Petitioner was to begin his case, the court asked Petitioner's trial counsel if he was ready to proceed with the case of the defense. (RP II, 172). In response, Petitioner's counsel stated that he had not had sufficient time to discuss with Petitioner his right to testify or remain silent; therefore he requested a recess until the following trial day to properly evaluate the case of the government and discuss with Petitioner his fundamental rights regarding his testimony. (RP II, 172) The court denied the request by Petitioner's counsel and **demanded** an **immediate** answer as to whether or not Petitioner was going to put on a case. (RP II, 173).

Without conferring with Petitioner, Petitioner's counsel stated that the defense would rest. (RP II, 173). Because counsel waived Petitioner's right to testify without conferring with him, the U.S. Attorney requested the court to voir dire Petitioner to determine whether Petitioner had been advised of his right to remain silent or to testify, and whether his attorney was waiving this right for Petitioner or if Petitioner was personally waiving his

right to testify. RP II, 173-174). Contrary to the holding in *U.S. v. Platter,* cited in this brief, infra., at page 8, the court in the instant case refused to voir dire Petitioner regarding whether he had knowingly, intelligently and voluntarily waived his right to testify by incorrectly reasoning that it had no right to do so and that it would not act as counsel for Petitioner. (RP II, 173).

Similar to the facts in United States ex rel *Wilcox v. Johnson,* 555 F.2d 115, 120 (3rd Cir. 1977), Petitioner Evans "was put to a Hobson's choice: decline to testify and lose the opportunity of conveying his version of the facts to the jury, or take the stand and forego his fundamental right to be assisted by counsel." In *Wilcox,* the court stated:

> A Defendant in a criminal proceeding is entitled to certain rights and protections which derive from a variety of sources. He is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted.

Id. at 120.

Thus, the trial court showed disregard for Petitioner's Constitutional rights and, in effect, placed him in a "bargaining position" when the court ordered Petitioner to choose between counsel and his right to make a closing argument. In addition, when Petitioner exercised his right to have effective counsel (by motioning to dismiss his attorney), the court punitively reacted by revoking his bail, again forcing Petitioner to choose between his right to bail and his right to effective counsel.

In *Faretta v. California*, 422 U.S. 806, 807 (1975), the Court evaluated the effectiveness of a waiver of a criminal defendant's right to counsel. In doing so, the Court held that a defendant must knowingly and intelligently waive his right to counsel, by reasoning:

> Although a defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently to choose self-representation, he should be made aware of the advantages and disadvantages of self-representation so that the record will establish that 'he knows what he is doing and his choice was made *with his eyes open*'. (our emphasis)

Id. at 835, citing *Adams v. United States, ex rel. McCann*, 317 U.S. 269, 279 (1942). Additionally,

> (t)he right to counsel and the right to defend pro se in criminal cases form a single, inseparable bundle of rights. . . .

U.S. v. Platter, 330 F.2d 271, 276 (2nd Cir. 1964). In all criminal cases, it is incumbent upon the presiding judge to explain to the defendant, by recorded colloquy, the following:

> [the defendant] has the choice between defense by a lawyer and defense pro se; that, if he has no means to retain a lawyer to defend him, without expense or obligation to him; that he will be given a reasonable time within which to make the choice; that it is advisable to have a lawyer because of his special skill and training in the law and that the judge believes it is in the best interest of the defendant to have a lawyer, but that he may, if he elects to do so, waive his right to a lawyer and conduct and manage his defense himself. If the result is a waiver of the right to counsel and an election to defend pro se, the presiding judge should conduct some sort of inquiry bearing upon the defendant's capacity to make an

> intelligent choice. In other words, there must be a record sufficient to establish to our satisfaction that the defendant 'knows what he is doing and his choice is made *with eyes open.*' (emphasis added)

Id., citing U.S.C.A. Const. Amend. 5 & 6; Act of 1789, 1 Stat. 73, 28 U.S.C.A. Sec. 1654; Fed.Rules Crim. Proc. Rule 44, 18 U.S.C.

It is appropriate for a criminal defendant to move to discharge his attorney for ineffective assistance as a defendant must have complete confidence in his counsel. *U.S. v. Mitchell*, 137 F.2d 1006 (2nd Cir. 1943).

> To compel one charged with grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.

Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970). On the occasion of such a discharge, however, the trial court must insure that the discharge is being accomplished "with eyes open" because the right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalism; rather, they rest on considerations that go to the substance of an accused's position before the law. *Adams v. U.S. ex rel. McCann, supra*, at 279.

Despite an express record of irreconcilable conflict between Petitioner and his trial counsel, the Court refused to allow Petitioner to dismiss his attorney and proceed pro se or allow his attorney to withdraw; the court failed to voir dire Petitioner regarding his capacity to make an intelligent choice to proceed pro se; and the Court said nothing to Petitioner concerning the perils of pro se representation. Because the court ordered that

Petitioner's counsel take no action in court without the express directive of Petitioner, and because Petitioner had already stated on the record that his trial counsel was no longer representing him and no longer had permission to speak for him, in effect, Petitioner proceeded pro se. Consequently, Petitioner was entitled to be advised of his right to counsel or to be voir dired concerning whether he had knowingly, intelligently, and voluntarily waived his right.

As the record reveals, both the prosecuting attorney and the defense attorney attempted to reason with the court from a standpoint of fairness and ethics in an effort to get the court to voir dire and/or advise Petitioner, but the court refused by incorrectly reasoning "I don't think I have authority to ask the Defendant anything." (RP II, 173). Since this issue of Petitioner's waiver of his right to counsel arose at a critical time in the trial, the closing argument for the defense, the importance of Petitioner's understanding of his right to counsel (and to make a closing argument), or his waiver of that right, is dramatically increased.

In *Herring v. New York*, 422 U.S. 853 (1975), the Supreme Court held that it is per se reversible error in any criminal trial, whether to a jury or to a judge, for the trial court to deny the defendant the opportunity to present a closing argument. The Court reasoned:

> The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a fact finding process, no aspect of such advocacy could be

> more important than the opportunity finally to marshall the evidence for each side before submission of the case to judgment.

Id. at 862. Remarkably, the right to a closing argument has been classified as a fundamental right, the denial of which constitutes reversible error without regard to the proof of prejudice to the defendant.

> . . . the opportunity to make closing argument is so fundamental a right that its denial must result in reversal of the conviction without regard to whether the defendant was prejudiced.

U.S. v. Spears, 671 F.2d 991 (7th Cir. 1982), citing *Herring v. New York*, 422 U.S. at 853, 864. In addition, the option to give a closing argument must be expressly waived.

> The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem, unless he has waived his right to such argument . . .

Spears, supra, at 992, citing *Herring* at 860, quoting *Yopps v. State*, 228 Md. 204, 207, 178 A.2d 879, 881 (1962). However, for a court to find waiver, the record must clearly demonstrate "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst, supra*, at 464.

> . . . where the issue of summation [closing argument] is not raised at the trial level, courts have split over whether to infer a waiver of the right of summation. In *City of Columbus vs. Woodrick*, 48 Ohio App.2d 274, 357 N.E.2d 58 (1976), the Court, citing *Herring*, held that because the right to make a closing argument is a fundamental constitutional right, it cannot be waived by mere silence. The court accordingly held that

> although there was no request to sum up, there was, nonetheless, no clear waiver of the right to do so, and the conviction without the benefit of a closing argument was reversible error. *Id.*, 357 N.E.2d at 60.

United States v. Spears, supra, at 993-994.

In the instant case, Petitioner had not made, "with his eyes open," an intentional relinquishment or abandonment of the right to counsel or the right to make a closing argument. The court refused to allow Petitioner to dismiss his attorney or to allow Petitioner's counsel to withdraw from the case. As a result, Petitioner's counsel was concerned that he had an ethical responsibility to give a closing argument for Petitioner. Even the prosecuting attorney was gravely concerned with the unfairness and impropriety of the court's decision not to hear a closing argument from Petitioner's counsel over Petitioner's objection. It was only at the insistence of the U.S. attorney that the judge even agreed to entertain the question of whether or not defense counsel could give a summation. (RP III, 51-60.)

However, the court ignored the United States attorney's concern and expressly refused to hear counsel's closing argument or to allow him to withdraw. (RP III, 60.) Thus, Petitioner was not advised regarding the perils of pro se representation, and the trial court denied Petitioner's counsel the opportunity to give a closing argument for Petitioner. Because petitioner was unable to give an effective closing argument himself, Petitioner was placed in the position of waiving his closing argument without having his "eyes open".

Later in the trial, following Petitioner's motion to dismiss his attorney, the trial court sua sponte revoked

Petitioner's bail (RP III, 23-26). This controversy began when Petitioner's trial counsel explained to the Court his frustration over the position in which the trial court had placed him.

> . . . I feel that I'm in a quandary, since you have not relieved me of my job as attorney of record. My client has instructed me to not argue. It leaves me in a very difficult position as to whether to argue or not contrary to his wishes or to continue acting on his behalf, because the Court has not relieved me of my duty as an attorney.

(RP III, 23). In response to this request by Petitioner's counsel, the Court not only failed to properly advise Petitioner of his right to counsel, but the Court replied in an unresponsive manner that in effect punished Petitioner for exercising his right to effective counsel and in a way that revealed the bias of the Court toward Petitioner:

> COURT: *I have not only relieved you as attorney, Mr. Donion* [Petitioner's counsel], I am now sua sponte revoking the bail of the defendant. He is now in the custody of the United States Marshal through any further proceeding.
>
> Do you understand what the Court just said, Mr. Evans [Petitioner]? (our emphasis)
>
> Petitioner: Uh-huh.
>
> COURT: You are now in the custody of the United States Marshal. They will be with you at all times, through all recesses. Do you understand that?
>
> Petitioner: Uh-huh.
>
> COURT: No more bail. And we will continue. We're going to read the instructions to the jury, Mr. Donion. Mr. Diskin [U.S. Attorney] is going to make the opening argument. And whether or not the defendant wishes you or himself to make the closing argument

> on behalf of the defendant is entirely up to him [Petitioner]. There will be no continuances. *There will be no relieving defense counsel.* (our emphasis)

(RP III, 23-24.) As the record shows, this action by the court clearly reveals the court's bias toward Petitioner, and evidences the Court's total disregard for the Constitutional rights of Petitioner. More importantly, however, as exemplified by the above highlighted portion of the preceding court record, the court's ruling was contradictory and equivocal as to whether Petitioner was proceeding pro se, making it impossible to know whether Petitioner's counsel was to represent Petitioner, even if he was inclined to do so.

In essence, by conditioning Petitioner's right to effective counsel on his right to have bail, the trial judge engaged in impermissible conduct. A criminal defendant's right to assert a constitutional right cannot be conditioned upon the court's taking from him another constitutional right. *United States ex rel. Wilcox v. Johnson, supra.*

CONCLUSION

The decision below was based on unsettled issues of law: does Petitioner have a fundamental constitutional right to testify at his own trial; is Petitioner's right a personal right that can only be waived by Petitioner; and is error in such circumstances presumed? Petitioner was forced to choose between the right to bail and the right to effective counsel; Petitioner did not have an effective advisement as to his right to testify; Petitioner's counsel waived

Petitioner's right to testify without his permission; and, finally, the trial court allowed Petitioner to ineffectively waive his right to testify and be represented by counsel. For all of these reasons, Petitioner's request for a writ of certiorari should be granted.

DATED: 7/28/89

Respectfully Submitted:

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APPENDIX A – OPINION FROM COURT OF APPEALS

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. PAUL E. EVANS, Defendant-Appellant.	)	No. 88-3028 D.C. CR-87-126-C (Filed JUN 09 1989)

APPEAL from the United States District Court for the Western District of WASHINGTON (Tacoma).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of WASHINGTON (Tacoma) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ___ judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered May 9, 1989

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PAUL E. EVANS, Defendant-Appellant.	No. 88-3028 DC No. CR-87-126-C MEMORANDUM* (Filed May 9 1989)

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

Argued and Submitted April 5, 1989
Seattle, Washington

Filed MAY 9 1989

Before: PREGERSON, BOOCHEVER, and NOONAN, Circuit Judges.

Paul Evans (Evans) appeals his conviction for conspiracy to distribute cocaine, distribution of cocaine, and distribution of cocaine in excess of 500 grams, in violation of 21 U.S.C. §§ 841 & 846. In addition, Evans appeals the 15-year sentence imposed by the district judge. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

I.

On May 8, 1987, an Alaska Airlines employee notified the Seattle police department that a suspicious package arrived from Los Angeles addressed to Ken Juarez. The police officers confronted Juarez after he arrived to claim the package and obtained his permission to search it. The package contained cocaine. Juarez agreed to cooperate with the authorities and lead them to his supplier. Juarez told the police that his supplier was Darryl Winston, whose supplier was Winston's uncle Paul Evans. Winston and Juarez both testified that Winston had sent cocaine to Juarez on prior occasions beginning in 1985 in the same manner. Juarez also testified that he had purchased cocaine from Leesa Uribe, Evans' live-in girlfriend, but never personally from Evans. Winston testified, however, that Evans supplied all the cocaine he sent to Juarez from 1985-1987.

On May 8, 1987, Juarez made several phone calls from the police station, all of which were recorded and admitted into evidence at trial. Juarez called Winston, and told him that he knew a buyer interested in a kilogram of cocaine. Juarez also called Evans at home, and testified that he talked to Evans shortly, and to Leesa Uribe about a cocaine purchase.

Winston testified that he agreed to supply the cocaine during a telephone conversation with Juarez, but that the transaction would have to be on a "cash and carry" basis. Winston flew to Seattle on May 28th to ensure that the buyer had the money before the cocaine was delivered. Juarez picked Winston up at the airport, and they both

checked into a local motel. Juarez introduced an undercover police officer as the alleged buyer, and the police officer showed Winston the purchase money. Winston and Juarez returned to the motel, and Juarez was told to leave the room. Winston testified that he then called Evans at his home in Los Angeles, and Evans told him that a "mule" would deliver the cocaine. The motel phone records corroborate Winston's testimony that he called Evans.

Winston later received a phone call from Evans, who explained that he was at the airport. Winston picked up Evans and proceeded to a local restaurant to meet the cocaine buyer. Winston first went to the "buyer's" car to make sure he still had the money. After Winston saw the money, he returned to Juarez' car where Evans was waiting. Winston then returned with the package of cocaine, and both Winston and Evans were arrested.

II.

A. *The denial of Evans' motion for a continuance.*

On November 6, 1987, Winston entered a plea of guilty to the distribution count and agreed to testify against Evans. On the opening day of trial (November 9th), Evans moved to continue the trial to allow him time to investigate the circumstances of the plea and Winston's background. The district court denied Evans' motion but stated that Evans could move for a recess if Winston testified.

A district court's decision denying a motion for a continuance is reviewed for an abuse of discretion, *see*

e.g., United States v. Pederson, 784 F.2d 1462, 1464 (9th Cir. 1986), unless the defendant's sixth amendment right to counsel is implicated. *See United States v. Studley*, 783 F.2d 934, 938 (9th Cir. 1986)(when the defendant's sixth amendment right to counsel is implicated, then the court will balance several factors to determine if the denial was fair and reasonable). Evans was not denied his right to counsel, consequently we review the district court decision solely for an abuse of discretion.

The district court did not abuse its discretion. First, the trial was originally scheduled for August but was continued two times at the request of the defense. Second, since Evans and Winston are related, Evans' attorney Donion could have interviewed Evans over the weekend for background information on Winston. Third, Evans, in effect, argues that the district court abused its discretion because it refused to continue the trial in order for Donion to conduct a pre-trial interview of Winston. Evans, however, was not entitled to a pre-trial interview of a government witness. *See United States v. Cutler*, 806 F.2d 933, 936 (9th Cir. 1986)(per curiam).

In *Cutler*, this court upheld a district court decision denying a defendant's request for a pre-trial interview of a government witness. The court reasoned that depositions, under Fed. R. Crim. P. 15, are not allowed merely to discover material for cross-examination. *Id.* The court held that the defendant could not use a demand for an interview to get informally what he could not have under the rule. "Moreover, the government was not obliged to make [the witness] available for trial nor did [the witness] have to consent to an interview." *Id.*

In this case Winston refused to consent to any pre-trial interview, and Evans' right to discover *Jencks* material did not arise until after Winston testified. The district court advised Evans that if the government called Winston as a witness, then he would grant a recess for Donion to talk to Winston. Evans, however, never moved for that recess.

Finally, there is no showing of actual prejudice. Donion cross-examined Winston extensively about his prior use and addiction to cocaine, and alleged jealousy and bias against his uncle, Evans, for allegedly stealing a girlfriend, Leesa Uribe.

B. *Juarez' Testimony.*

Evans also argues that the district court erred by denying his motion to strike Juarez' testimony entirely. This argument is wholly without merit. Juarez testified to many events within his personal knowledge such as the prior cocaine transactions with Winston and Uribe between 1985 and 1987, and the events leading to the arrest of Winston and Evans on May 28th.

Evans' basic complaint is that Juarez was allowed to testify that both Winston and Uribe told him that Evans was their source for the cocaine. The district court admitted these statements under the co-conspirator exception to the hearsay rule under Fed. R. Evid. 801(d)(2)(E).

Evans argues that there was insufficient evidence of his knowledge of and participation in the alleged conspiracy to distribute cocaine and consequently the extrajudicial statements were improperly admitted. Before the extrajudicial statements of a co-conspirator may be

admitted into evidence, the government must prove by a preponderance of the evidence the accused's knowledge of and participation in the conspiracy. *See e.g., Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 2778-2779 (1987). This circuit has held that a co-conspirator's extra-judicial statement alone is insufficient to meet this threshold burden. *See United States v. Silverman*, 861 F.2d 571, 577 (9th Cir. 1988).

The standard of review in this circuit is unclear after *Bourjaily*. *See id.* at 576; *see also United States v. Gordon*, 844 F.2d 1397 (9th Cir. 1988). Before *Bourjaily*, we reviewed a district court's decision de novo. As in *Silverman* and *Gordon*, however, we need not decide whether *Bourjaily* mandates a change in the standard of review because these statements were properly admitted under either the de novo or clearly erroneous standard of review.

In this case there was overwhelming evidence that Evans knew of and participated in the conspiracy. First, Winston testified that Evans was the source for all the cocaine that he sold to Juarez. Juarez also testified that Evans told him to see Leesa Uribe about any purchase of cocaine. Also, there was sufficient circumstantial evidence about the telephone calls to Evans' house.

Finally, Evans arrived in Seattle with the cocaine for sale, and his fingerprint was found on the inside of the cellophane wrapped around the cocaine.

Last, Evans argues that there was insufficient evidence that these statements were made in the course of and in furtherance of the conspiracy. We review the district court's conclusion for clear error. *United States v. Smith*, 790 F.2d 789, 794 (9th Cir. 1986). Juarez testified

that both Winston and Uribe told him that Evans was their source when he complained about late deliveries. This is sufficient to show the statements were made during the conspiracy, and in its furtherance because Winston and Uribe were trying to appease their customer.

C. *Evans' right to testify.*

Evans argues that he was denied his right to testify in his own defense because the district court refused to grant a continuance after the government concluded its case-in-chief. We review a district court's denial of a continuance for an abuse of discretion.

At the conclusion of the government's case-in-chief, the defense renewed its motion to strike Juarez' testimony. The district court denied this motion, but granted Donion's request for a brief recess to consult with his client. After the recess, Donion asked for a continuance until November 12th. Donion stated "Your Honor, we were rushed up to the Court. My client and I have not really – we were anticipating basically that the government would not finish their case today, *and its hard to have a rushed conversation in the hall regarding his testimony or not.*" (emphasis added). Evans argues that this passage demonstrates that Donion never discussed his right to testify. Consequently, according to Evans it was incumbent on the court to either grant the continuance or personally advise him of his right to testify.

Evans' argument is without merit. First, Donion only stated that it was hard to have a rushed conversation in the hallway about whether Evans should testify, and not that he had never discussed this right with his client.

Also, Evans cites no rule or case for the proposition that a district judge must personally inquire whether the defendant, when represented by counsel, intends to waive the right to testify and advise the defendant of the consequences of such a waiver. Fed. R. Crim. P. 11 requires a district judge to inform a defendant that a guilty plea waives the right to testify, however, the procedures delineated in Rule 11 apply solely to the acceptance of guilty pleas. *United States v. Ferreboeuf*, 632 F.2d 832, 836 (9th Cir. 1980), *cert. denied* 450 U.S. 934 (1981)(Rule 11 does not apply to the acceptance of stipulations).

The district court denied the continuance reasoning that Donion had been the attorney of record since July and had ample time to plan trial strategy. The district court was concerned that Donion's request was merely to delay the outcome of the trial. While we do not decide whether Donion's request was made for delay, we note that this court has upheld a district court's denial of a continuance when the defendant's conduct is " 'dilatory and hinders the efficient administration of justice,' . . . even if it results in the defendant being unrepresented at trial." *United States v. Kelm*, 827 F.2d 1319, 1322 (9th Cir. 1987)(quoting *United States v. Leavitt*, 608 F.2d 1290, 1293 (9th Cir. 1979)).

Donion asked for a continuance on the first day of trial after the trial had been continued two times before. In view of the entire record the court did not clearly err in considering that Donion's request might be for the purpose of delay. The district court did not abuse its discretion in denying the continuance.

D. *Evans' Right to Make a Closing Argument.*

On November 10, 1987, the government rested and the defense rested without calling a witness. The court was recessed until November 12, 1987, with only the closing arguments remaining to be heard. On November 12, 1987, Evans filed a pro se motion for a mistrial based on ineffective assistance of counsel, judicial bias, and prosecutorial misconduct. Evans also indicated in this motion that he fired his attorney, Mr. Donion, and retained new counsel. Evans did not move for a continuance to allow his new counsel time to participate in the remainder of the trial. Donion filed a motion to withdraw which the district court denied.

Evans argues that he was denied his right to make a closing argument because of the district court's failure to accept his motion to fire his attorney, Mr. Donion. The record, however, indicates that Judge Tanner did allow Evans to proceed pro se. During the proceedings, Evans stated several times that Donion no longer represented him. Judge Tanner then asked Evans whether he was acting as his own attorney, and Evans responded "you could say that." The record as a whole indicates that Judge Tanner treated Evans as if he was representing himself, and requested Donion to remain only in the event that Evans wished to consult with an attorney.

The record also indicates that Evans waived his right to make a closing argument after Judge Tanner expressly advised him of his right to do so. The only question is whether Judge Tanner's failure to expressly advise Evans of the pitfalls of self-representation violated his sixth amendment right to counsel.

"An indigent criminal defendant has an absolute right under the sixth amendment to be represented by counsel or to represent himself . . . " *See United States v. Wadsworth*, 830 F.2d 1500, 1504 (9th Cir. 1987). A defendant choosing self-representation, however, must knowingly and intelligently waive his right to counsel. *See e.g., id.* at 1504. Ordinarily in this circuit, to establish a knowing and intelligent waiver the district court must discuss three elements with the defendant: 1) the nature of the charges; 2) the possible penalties; and 3) the dangers of self representation. *Id.* This court has stated, however, that on rare occasions a knowing and intelligent waiver might be found in the absence of this express colloquy. *See United States v. Rylander*, 714 F.2d 996, 1005 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984); *see also United States v. Balough*, 820 F.2d 1485, 1489 (9th Cir. 1987). "The denial of the right to counsel at trial is prejudicial per se." *Wadsworth*, 830 F.2d at 1505; *see also Balough*, 820 F.2d at 1489-90 (harmless error doctrine does not apply when defendant was not represented by counsel).

Evans argues that he was denied his right to counsel because Judge Tanner did not expressly discuss the pitfalls of self-representation. Evans argues that this court has applied a stringent test to determine whether a defendant intelligently waived his right to counsel in the absence of the required colloquy. *See United States v. Kimmel*, 672 F.2d 720, 722 (9th Cir. 1982); *see also Rylander*, 714 F.2d at 1005.

We agree that the test is stringent, however, the cases cited by Evans are inapplicable to his situation. In all the cases cited by Evans, the criminal defendant proceeded pro se throughout the entire trial. When a defendant

intends to proceed pro se for an entire trial, the pitfalls of self-representation will be numerous and varied. In this case, however, Evans proceeded pro se only on the last day of trial when all that remained was to decide whether to make a closing argument. Consequently, we need find only that Evans was aware of the dangers of not giving a closing argument.

Judge Tanner specifically advised Evans that he had the constitutional right to counsel, and the right to make a closing argument, and if he remained silent he would waive that right. Evans was also aware that Donion believed that such an argument was critical to his case. Although Judge Tanner did not specifically advise Evans of the importance of giving a closing argument, we find that Evans, by Donion's arguments with the court, was aware of the danger of not giving a closing argument.

E. *The district court's alleged appearance of partiality.*

On the last day of the trial, Judge Tanner sua sponte revoked Evans' bail after Donion asked for the second time for permission to give a closing argument over Evans' objection. United States Attorney Diskin asked the court to reconsider its decision "because the court is concerned not only with being fair, but with appearing to be fair, too, to the defendants." Judge Tanner refused to reconsider his decision, and only explained the reason for his action after the government finished its closing argument. Judge Tanner's stated reason was that Evans "posed a certain security risk to this court and perhaps to the jury."

Evans argues that this action casts doubt on Judge Tanner's partiality throughout the entire trial. Evans also argues that this violation of the appearance of fairness in conjunction with the denial of an opportunity to make a closing argument mandate reversal. We reject both arguments. First, as stated earlier, Judge Tanner expressly advised Evans of his right to make a closing argument several times. The only question is whether Judge Tanner's decision to revoke Evans' bail violated the appearance of fairness and is sufficient to call into question the impartiality of Judge Tanner and the fairness of the trial. We reject both contentions.

Although it would have been preferable for the district court to state its reasons for revoking bail immediately, we cannot conclude that the court's action was unjustified. The government presented a case with overwhelming evidence of Evans' guilt. Evans chose to rest without rebutting any of the government's evidence. It was reasonable for Judge Tanner to believe that under these circumstances, Evans posed a threat to flee the jurisdiction. Consequently, we find that the revocation of bail is insufficient to demonstrate either that Judge Tanner was biased against Evans or that he was not given a fair trial. This all occurred outside the presence of the jury, and the jury was never informed that Evans' bail was revoked.

F. *Ineffective Assistance of Counsel.*

Whether a defendant received ineffective assistance of counsel is reviewed de novo. *Weygandt v. Ducharme,*

774 F.2d 1491, 1492-93 (9th Cir. 1985). To establish ineffective assistance of counsel, Evans must show that: 1) Donion's alleged inadequacies fell below those of a reasonably competent attorney; and that 2) he suffered prejudice as a result of those errors. *See e.g., id.* at 149.

Evans argues that he was denied effective assistance of counsel because of his attorney's failure to object to the government's use of leading questions; his attorney's failure to cross-examine many witnesses; his attorney's failure to have a defense theory or strategy; and his attorney's lack of knowledge regarding the rules of evidence. All of these arguments are meritless.

Evans fails to show that he suffered any prejudice from the his attorney's failure to object to leading questions, cross-examine witnesses, or present a defense theory. The government led some witnesses with material that was either already admitted into evidence or was background material. Likewise, Evans' argument that Donion failed to cross-examine witnesses suffers from the same defect. Finally, Evans fails to argue what theory of defense Donion should have argued. Donion tried to argue that Winston was lying based on his jealousy of Evans for stealing a girlfriend.

Evans also argues that Donion's inadequate understanding of the rules of evidence prevented the introduction of specific acts of misconduct to impeach Winston. This argument is misleading and meritless. Donion attempted to cross-examine Winston regarding past incidents of alleged theft (non-convictions) which is permissible in the discretion of the district court judge under Rule 801(b)(1). The district court refused to allow Donion

to cross-examine Winston about these events. Evans argues that Donion should have used 801(d)(1), but then quotes from Rule 801(b)(1) which Donion cited to Judge Tanner as support for his proposed cross-examination, or Rule 809 which allows extrinsic evidence of *convictions alone*.

Last, Evans argues that Donion's failure to advise him of his right to testify constituted ineffective assistance of counsel. We have insufficient facts in the record to support this claim except the somewhat ambiguous statement made by Donion when he moved for a continuance. Actually the statement by Donion suggests that he did discuss this right with Evans. The lack of fact-finding is one reason this court has stated that claims of ineffective assistance of counsel are best raised in a habeas corpus petition. *See United States v. Sanclemente-Berjarano*, 861 F.2d 206, 211 (9th Cir. 1988).

G. *Evans' 15-year Sentence.*

Evans was convicted under counts I, II & IX of the indictment, and sentenced to 15 years for each count, to run concurrently with an additional condition of five years supervised release. Evans argues that this sentence was excessive because he was a first time offender. Evans' contention is without merit.

Evans was sentenced within the guidelines, and "a sentence is generally not subject to appellate review if it is within the statutory limits. *United States v. Barker*, 771 F.2d 1362, 1364 (9th Cir. 1985). In this case, Evans does not argue that Judge Tanner considered inappropriate information or failed to individualize his sentence. Evans

argues generally that a 15-year sentence is harsh for a first time offender. The sentence, however, is within the statutory limit, and the evidence showed that although this was Evans' first conviction it was not his first drug transaction.

Consequently, the judgment of conviction and the sentence are *AFFIRMED*.

APPENDIX B – MOTION FOR MISTRIAL

Judge Jack E. Tanner

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff v. PAUL E. EVANS and DARRYL D. WINSTON, Defendants.	No. CR 87126CT DEFENDANT EVANS MOTION FOR MISTRIAL

I, Paul E. Evans, want this Court, the Honorable Jack E. Tanner presiding, to declare these proceedings a mistrial for the following reasons:

1. My attorney has been ineffective in the following ways:

   a. Mr. Donion did not know the rules of criminal procedure, the Court had to constantly correct/refer him to the right rules.

   b. Mr. Donion did not vigoriously pursue his objections and exceptions.

   c. Mr. Donion was belittled and ridiculed in front of the jury by the judge and prosecutor, he did not object once.

   d. Mr. Donion allowed himself to be intimidated by the State's witnesses, he did not object.

   e. Mr. Donion charged me $10,000 and gave me the impression that he was experienced in Federal work when in fact he has never tried a Federal Criminal Case.

f. I have instructed him not to proceed any further with my defense.

g. The Court had to repeatedly tell Mr. Donion to stand up, speak up and not to rely on the prosecutor to produce, signed copies of plea agreements.

h. I was also uncomfortable that the Jury was all white.

2. This Court has been not neutral and detached in its treatment of my attorney's objections, motions, and exception in the following ways:

a. Each time Mr. Donion made an objection the judge would make faces and negative gestures.

b. Through observing the Judges body language, his negative gestures and facial expressions probably lead the jury to believe that he looked at this trial as a personal inconvience to him.

c. The Court took light of these proceedings by making Seahawk foot ball jokes during the cruical part of the proceeding – jury instructions.

d. The Court denied all my attorney's objections and sustained all prosecutions objections as reflected in the records.

e. The Judge perjured himself by calling the defense competent when the record clearly shows that the judge had to correct the attorney on procedure many times, see the record.

f. The Court, as reflected by the record, has proved to be both bais and prejudiced against me for some unknown reason.

3. The prosecutor has misconducted himself in the following ways:

a. He allowed his star witness girlfriend to sit in the courtroom and in the witness room. She was overheard telling her boyfriend and informant Winston what each witness said under oath.

b. The prosecutor, with the Court's help, put testimony into the mouths of witnesses, please see the record.

c. The prosecutor took advantage of Mr. Donion's lack of experience, please see record.

I have consulted and retained another attorney who will either represent me in another trial or handle my appeal. We believe that the court has prevented me from receiving a fair trial, merely because my attorney was ineffective and unprepared to handle the magnitude of a trial of this type. The court's activities has certainly resulted in prejudicial error. I want this statement read into the record as well as filed with the Clerk of the Court.

_____ _____

Date Paul E. Evans
Pro-Se

APPENDIX C – TRIAL JUDGMENT

Judge Tanner

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

UNITED STATES OF AMERICA, Plaintiff v. PAUL E. EVANS, 3001 Fulton Little Rock, AR 72006 SSN: 431-23-7164 Defendants.	No. CR 87-126T JUDGMENT AND COMMITMENT (Filed FEB 12, 1989)

On this 22nd day of January, 1988, came the attorney for the Government and the defendant appeared in person and with counsel, Bryan G. Hershman.

IT IS ADJUDGED that the defendant upon his pleas of not guilty, and a verdict of GUILTY, has been convicted of the offense of conspiracy to distribute cocaine in violation of Title 21, United States Code, Section 846; distribution of a quantity of cocaine in violation of Title 21, United States Code Sections 841(a)(1) and 841(b)(1)(C); and distribution of in excess of five hundred (500) grams of cocaine in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B), as charged in Counts I, II, and IX, respectively, of the Indictment dated June 24, 1987, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED as to Count I, that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of FIFTEEN (15) YEARS, pursuant to 18 U.S.C. § 4205(a);

IT IS ADJUDGED as to Count II, that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of FIFTEEN (15) YEARS, to be followed by a term of supervised release of FIVE (5) YEARS, pursuant to 18 U.S.C. § 4205(a). The sentence of imprisonment shall ~~run~~ concurrently with the term of imprisonment imposed as to Count I, above.

IT IS ADJUDGED as to Count IX, that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN (15) YEARS, to be followed by a term of supervised release of FIVE (5) YEARS, pursuant to 21 U.S.C. § 841(b)(1)(B). The sentence of imprisonment and supervised release shall run concurrently with the terms of imprisonment and supervised release imposed as to Count I and II, above.

IT IS ORDERED that, pursuant to Title 18, United States Code, Section 3013, defendant shall pay the sum of FIFTY DOLLARS ($50.00) on each of Counts I, II, and IX for a total of ONE HUNDRED FIFTY DOLLARS ($150.00) as a mandatory penalty assessment to be deposited in the Crime Victims Fund.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal of other qualified officer and that the copy serve as the commitment of the defendant.

DATED this 11 day of February, 1988.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ Francis J. Diskin
FRANCIS J. DISKIN
Assistant United States Attorney

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office. ATTEST: BROCK RIFKIN Clerk, U. S. District Court, Western District of Washington.

By B Kay McDaniel
Deputy Clerk

APPENDIX D – EXCERPTS FROM TRIAL TRANSCRIPT

(p. 2) MORNING SESSION

[Jury out.]

THE COURT: I have received defendant Evans' motion for mistrial. Does the government have a copy of it?

MR. DISKIN: I have a copy, Your Honor.

THE COURT: Mr. Evans, is this your motion, sir?

THE DEFENDANT: Yes.

THE COURT: In your motion, Mr. Evans, you allege that Mr. Donion has been ineffective in the following ways:

> "Does not know the Rules of Criminal Procedure and the Court had to constantly refer him to the right rules."

Do you have anything further to add to that, sir? ask.

THE DEFENDANT: Not at this time.

THE COURT: I think I should tell you, if you do not understand it, you do have a right to represent yourself. You have a right to retain counsel, constitutional right.You also have a constitutional right to represent yourself. You understand? I assume you are now electing to represent yourself?

THE DEFENDANT: Well, I just –

THE COURT: I'm asking you directly, are you representing yourself now?

THE DEFENDANT: No.

THE COURT: Do you want Mr. Donion to represent you (p. 3) on your motion then?

THE DEFENDANT: I wouldn't mind – I mean, he could read it.

THE COURT: Pardon?

THE DEFENDANT: He could read it to the Court.

THE COURT: I've read it.

THE DEFENDANT: I mean in court for it to be in the record.

THE COURT: It will be part of the record. But we're here today to proceed in this trial. Oh, it will be part of the record on appeal, if there is such a thing, if there is an appeal in this case. I don't know what the jury is going to do. I'm just trying to find out if you are going to now represent yourself when you attempted to dismiss Mr. Donion. That's what I'm asking you. The trial's not going to stop.

[Voice speaking from the rear of the courtroom.]

THE COURT: There is no speaking from the rear of the courtroom.

THE DEFENDANT: I'm aware that the trial is not going to stop.

THE COURT: All right.

THE DEFENDANT: But I feel that I'm not being properly represented.

THE COURT: All right. That's what I'm trying to ascertain. So are you speaking for yourself?

(p. 4) THE DEFENDANT: I'm not going to say anything.

THE COURT: You don't want to say anything?

THE DEFENDANT: This is all I have to say.

THE COURT: Oh. So everything you have said here is it?

THE DEFENDANT: This is it.

THE COURT: All right.

For the record, the Court finds that Mr. Donion is competent, has proceeded in a competent way in this case. I don't know of any lawyer that can ever change the facts of the case. The facts are the facts and the law is the law of the case. I find no misconduct by either Mr. Donion or by Mr. Diskin on behalf of the United States.

If you, Mr. Evans, wish to further participate in the instructions, since it's your case, you can make that decision. If you wish to make a closing statement to the jury on your behalf, you can do so. That is your election and your election alone to make. Or Mr. Donion can make it. It's up to you, sir, and your attorney.

But one thing I noticed from your motion. You say this Court is biased and prejudiced against you. Well, Mr. Evans, I have never seen you before this case. I know nothing about you other than what has come out in this case. I find no reason. Just because you're black, sir, means nothing to this Court, and that I happen to be black, if that's what you're (p. 5) attempting to insinuate.

THE DEFENDANT: No, I didn't state anything in here about race, creed or color.

THE COURT: All right. You say, sir, that you do not know why. You say:

> "The Court as reflected by the record has proved to be biased and prejudiced against me for some unknown reason."

THE DEFENDANT: For some unknown reason.

THE COURT: All right. I just want to make the record straight.

All right. We're now on the instructions.

MR. DISKIN: Before we get to that, Your Honor, can I make one suggestion in this regard?

THE COURT: Yes.

MR. DISKIN: Perhaps the Court, in view of Mr. Evans' concern, could invite his attention to Rule 33 of the Federal Rules of Criminal Procedure. Following the trial, and if there is a verdict against him, he has seven days to file a motion for a new trial. This certainly could be the basis of that, that he or some other attorney on his behalf could pursue, and I just want to know if the Court wanted to alert him to that opportunity.

THE COURT: Mr. Diskin, I do not intend to represent Mr. Evans in any way. I think it's improper.

(p. 6) MR. DISKIN: I'm not suggesting you represent him in any way, Your Honor. I'm just suggesting that as the –

THE COURT: I'm not anticipating anything.

MR. DISKIN: Well, I understand that, Your Honor. But as the supervisor of the proceedings –

THE COURT: Yes?

MR. DISKIN: – and in attempting to be fair to both sides, I think it would be appropriate to invite the defendant's attention to that rule.

THE COURT: The motion, Mr. Evans, for mistrial will be filed and the motion for mistrial is denied. The trial will proceed.

MR. DISKIN: Your Honor, with respect to the instructions, if we are ready to turn to that.

THE COURT: Yes?

MR. DISKIN: I do not have any support one way or the other, frankly, for the proposition that a plea of guilty prior to sentence is or is not the conviction for purposes of that instruction. But in reviewing my notes of the cross-examination of Mr. Juarez, he at least indicated that he had a felony conviction. Whether that's so or not, that is part of the record before the jury, so I'm going to withdraw my objection to the testimony of a witness may be discredited, impeached –

THE COURT: I was going to leave it in anyhow.

* * *

(p. 10) THE COURT: Under the rules only the Court can relieve you. If he wants to hire another attorney or act as his own, he can. But as far as I'm concerned, you're still the attorney of record.

Have you read the instruction?

MR. DONION: Your Honor, I'm – I feel myself on the horns of a dilemma in regard to this present situation. I have been instructed by my client to not represent him any further, and I guess on that basis I must ask to withdraw.

THE COURT: All right. The motion to withdraw is denied. You will sit there in case you are needed for guidance either by the Court or by the defendant. If the defendant does not wish you to participate actively, that's up to him. But we're going to continue.

MR. DONION: May I interject one thing for this as before this aspect is continued?

I would like to note that on Tuesday Madam Clerk suggested that Mr. Evans take possession of some items that were contained in the suitcase. The suitcase that has been entered in evidence, it's item No. 14, these items were placed into evidence inside of the suitcase, and I believe that they should remain inside of the suitcase. I don't think an exhibit, once it is admitted in evidence, should be altered in any respect, and I understand the clerk's position that there was no reference to these items that were inside of it, but I (p. 11) don't think it's appropriate for me or anyone else to remove an item from an exhibit that has been admitted into evidence.

THE DEFENDANT: Your Honor –

MR. DISKIN: If I can address the Court, Your Honor?

THE COURT: Yes.

MR. DISKIN: I moved into evidence the piece of hand-carried luggage, 14, when your clerk indicated

there were items in it they were removed, because I was only offering the item which was identified by the witness as the item carried by the defendant. If the counsel for the defense or the defendant himself thinks it's inappropriate for him to take custody of the contents, the government will maintain them. We seized them, and I'll keep them until we dispose of it in the regular course of business.

THE COURT: Whatever. They're not going to the jury in any event.

MR. DONION: Well, I just felt that there was no basis for me to authorize Mr. –

THE DEFENDANT: Your Honor –

THE COURT: Yes, Mr. Evans?

THE DEFENDANT: Like I stated, Mr. Donion is not representing me on my behalf. What he was saying, that evidence was in the bag when I was incarcerated.

THE COURT: We have no problem. I don't see any issue. What's the issue? The jury hasn't seen anything that (p. 12) wasn't offered in evidence, that was in or out of the bag. All they saw was the bag.

All right. I'm going to give:

"The law does not compel a defendant in a criminal case to take the witness stand and testify . . . ."

That will be placed in just before:

"You have heard the testimony from persons described as expert . . . ."

And I will give you now a copy, to the defendant and the government.

Have I given the accomplice instruction, do you remember, Mr. Diskin?

MR. DISKIN: I'm sorry, Your Honor?

THE COURT: Have I given the accomplice instruction?

MR. DISKIN: I believe you had it in there. Your Honor.

THE COURT: I can't find it.

MR. DISKIN: Yes, Your Honor, it's part of your package that you handed out on Tuesday. It follows:

"The informer who was a narcotics addict. . . ."

THE COURT: That's out. Okay. I've got the informer. I've got that one. Now, the only one I was looking at:

> "The witness Darryl D. Winston has pleaded guilty to a crime arising out of the same event for which the defendant is on trial. This guilty plea is not
>
> * * *

(p. 23) and I suggest that you possibly inform the jury that there are some preliminary matters that still need to be addressed, or just leave them out.

THE COURT: Consult with whom?

MR. DONION: A colleague, Your Honor. There is a – I feel that I'm in a quandary, since you have not relieved me of my job as attorney of record. My client has instructed me to not argue. It leaves me in a very difficult position as to whether to argue or not contrary to his wishes or to continue acting on his behalf, because the Court has not relieved me of my duty as an attorney.

THE COURT: That's correct.

MR. DONION: And I need sometime to resolve that.

THE COURT: I have not only relieved you as attorney, Mr. Donion, I am now sua sponte revoking the bail of the defendant. He is now in the custody of the United States Marshal through any further proceeding.

Do you understand what the Court just said, Mr. Evans?

THE DEFENDANT: Uh-huh.

THE COURT: You are now in the custody of the United States Marshal. They will be with you at all times, through all recesses. Do you understand that?

THE DEFENDANT: Uh-huh.

THE COURT: No more bail. And we will continue. We're going to read the instructions to the jury, Mr. (p. 24) Donion. Mr. Diskin is going to make the opening argument. And whether or not the defendant wishes you or himself to make the closing argument on behalf of the defendant is entirely up to him. There will be no continuances. There will be no relieving defense counsel.

MR. DONION: I would request further opportunity to have a little longer recess, Your Honor.

THE COURT: To talk to the defendant?

MR. DONION: That would be one of the things that I would like to do.

THE COURT: Do you want to talk to the defendant?

MR. DONION: Yes, and make a telephone call.

THE COURT: Nope. Right here in the courtroom.

MR. DONION: Okay.

THE COURT: You still want more time? It will be here in this courtroom.

MR. DONION: Fine.

THE COURT: Or in the lockup in the Marshal's room. No more phone calls to anyone outside.

MR. DONION: I would like five minutes, Your Honor.

THE COURT: All right. I'll give you five minutes.

[Recess.]

[Jury out.]

THE COURT: Be seated.

Ready for the jury? Bring the jury.

(p. 25) MR. DISKIN: Your Honor, just before we do that, can I make one comment as an officer of the Court? It may be a small matter but perhaps the Court was under the impression that the delay in getting everyone back together before was because the defendant was down the hall talking with the young woman who's been here, and I don't think the defendant precipitated any delay in getting the preceedings started again.

I haven't made any motion at the present time to revoke his bail, although that may come in due course. but because the Court is concerned not only with being

fair but with appearing to be fair, too, to defendants, I would urge the Court to reconsider remanding the defendant at the present time.

We're still in trial; he hasn't been convicted yet. Bail was set with concurrence of the magistrate sometime ago. He's made all his appearances, and I just wanted to make sure the Court didn't think he caused that last delay and that was the basis for the Court's ruling, and urge you to reconsider that until the conclusion of the proceedings.

THE COURT: I wasn't aware that the Court did it on the government's motion.

MR. DISKIN: You didn't, and I didn't know why you did it and you didn't explain why you did it. And I just know that you've got to – you want to appear fair as well as being (p. 26) fair, and I would urge the Court to reconsider that until the conclusion of the proceedings and reinstating bond until we get –

THE COURT: Are you ready to proceed?

MR. DISKIN: Did the Court consider my motion to reinstate bail?

THE COURT: Is that the motion?

MR. DISKIN: That's my motion.

THE COURT: Denied. He will be in the custody of the Marshal.

MR. DISKIN: Okay.

[Jury in.]

THE COURT: Be seated, please.

Let the record reflect all members of the jury are present, defendant's present, all counsel, both parties having rested.

Members of the jury, now that you have heard all the evidence and the arguments of lawyers, which will come after these instructions, it is my duty to instruct you on the law which applies to this case.

[Instructions read by the Court.]

You will now hear the opening-closing statement by Mr. Diskin on behalf of the government of the United States.

Mr. Diskin.

MR. DISKIN: May it please the Court, counsel, ladies

* * *

(p. 172) recess to discuss with my client whether or not there will be any –

THE COURT: Let us know.

[Recess.]

[Jury out.]

THE COURT: Are you ready, Mr. Donion?

MR. DONION: Your Honor, we were rushed up to the Court. My client and I have not really – we were anticipating basically that the government would not finish their case today, and it's hard to have a rushed conversation in the hall regarding his testimony or not.

There would be no testimony except for his.

THE COURT: Well –

MR. DONION: And I – but what I would ask the Court to do is to – I would ask the Court to recess until Thursday. It seems –

THE COURT: For what reason?

MR. DONION: I would like to have more opportunity to discuss the –

THE COURT: We've been here two days, Mr. Donion.

MR. DONION: I understand that.

THE COURT: And when does the record show that you became the defendant's attorney?

MR. DONION: Your Honor, I understand the Court's point.

(p. 173) THE COURT: Well, there's no reason to believe it will be any different situation Thursday morning than it is now.

MR. DONION: I agree.

THE COURT: Well, you're either going to proceed or you're going to rest, one of the two.

MR. DONION: We will rest, Your Honor.

THE COURT: Defendant will rest? Are you ready for the instructions?

MR. DISKIN: Your Honor, I think it would be helpful if the Court inquire personally of the defendant the consequences of waiving his right to testify. I just want it

on the record clear that the defendant is making the choice not to testify in his own behalf.

THE COURT: Well, Mr. Donion's his attorney.

MR. DISKIN: I understand that, but I just want that clear that the defendant is doing it. I think it would help later on, Your Honor.

THE COURT: I don't think I have authority to ask the defendant anything.

MR. DISKIN: Yes, Your Honor, I –

THE COURT: Under what rule?

MR. DISKIN: Your Honor, I submit that the Court has the inherent power to ask the defendant whether or not he's going to testify, and if not, understanding the consequences (p. 174) of – of that. I mean, he has a right not to, and he has a right to testify. I just think the defendant should tell the Court what his decision is.

THE COURT: Mr. Diskin, the defendant appears here by competent counsel. He's not pro se.

MR. DISKIN: I'm just trying to save myself a paragraph in an appellate brief, Your Honor.

THE COURT: Well, that's the way it's going to have to be. I don't think I have any authority to represent the defendant.

MR. DISKIN: I'm not asking you to represent him, Your Honor.

THE COURT: If you can show me a case where the Ninth Circuit says the Court has the duty or the authority

to represent the defendant, to ask him under these circumstances, when he's represented by competent counsel, I'll look at it. Other than that, I'm going to decline the invitation.

MR. DISKIN: I can only make the invitation. What is Your Honor's pleasure then on how we proceed the rest of the afternoon?

THE COURT: Well, we're going to go to the instructions.

MR. DISKIN: Fine, You Honor.

THE COURT: Here, give them a copy of them.

Well, when will you be ready for the instructions, to take

* * *

APPENDIX E – 28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by court of appeals of any question of law in any civil or criminal case as to which instructions are desired and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch 646, § 1, 62 Stat. 928; June 27, 1988, P. L. 100-352, § 2(a), (b), 102 Stat. 662.)

No. 89-175

FILED
OCT 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

PAUL EVANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, at the close of the government's case, the district court should have advised petitioner that he had a right to testify or to remain silent.

2. Whether the district court adequately advised petitioner of his right to counsel when petitioner sought to dismiss his attorney before closing argument.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-16) is not reported, but the judgment is noted at 874 F.2d 817 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1989. The petition for a writ of certiorari was filed on July 31, 1989, and it is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846, and two counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 15 years' imprisonment on each count, to be followed by five years' supervised release. The court of appeals affirmed.

1. The evidence at trial showed that between 1985 and 1987 petitioner supplied his nephew, Darryl Winston, with cocaine, which Winston in turn sold to Kenneth Juarez. The arrangement unraveled when, on May 8, Juarez was arrested at the airport in Seattle, Washington, after picking up a package of cocaine that Winston had mailed to him from Los Angeles. Juarez agreed to cooperate with the authorities and thereafter asked Winston to supply him with one kilogram of cocaine. Petitioner informed Winston that the kilogram would cost $31,000. On May 28, 1987, petitioner brought the cocaine to Seattle. Both he and Winston were arrested after delivering the drugs to an undercover officer. Pet. App. 3-4; Gov't C.A. Br. 4-10.

2. At the close of the government's case, defense counsel E. Gary Donion requested a recess to discuss with petitioner the evidence that the defense would present. After the recess, Donion requested a continuance; he explained that the defense had not anticipated that the government would finish presenting its case that day, and that he wanted "more opportunity" to discuss with petitioner whether petitioner should testify, since he and his client found it "hard to have a rushed conversation in the hall regarding his testimony or not." 11/10 Tr. 172; Pet.

App. 8.[1] The court denied the motion, reasoning that counsel's request was dilatory since the defense had had ample time to plan trial strategy previously. Pet. App. 9. Donion replied that petitioner would rest. 11/10 Tr. 173. The prosecutor then interjected that petitioner had a right to testify, if he chose to do so. Petitioner did not assert that he wanted to testify. 11/10 Tr. 173-174. The court then recessed for the Veteran's Day holiday.

When the court reconvened, petitioner submitted a pro se motion for a mistrial claiming ineffective assistance of counsel, judicial bias, and prosecutorial misconduct. 11/12 Tr. 2; Pet. App. 10. Petitioner indicated in his motion that he had retained new counsel who could assist him in a retrial (Pet. App. 19), although he did not ask to substitute counsel in his ongoing trial.

Upon receipt of the motion, the district court advised petitioner that he had a right to represent himself and a right to counsel. 11/12 Tr. 2. Petitioner indicated that he would like his present counsel, Donion, to represent him on his motion. 11/12 Tr. 2-3. The district court found that Donion had competently represented petitioner thus far. The court then addressed petitioner (11/12 Tr. 4):

> If you * * * wish to further participate in the instructions, since it's your case, you can make that decision. If you wish to make a closing statement to the jury on your behalf, you can do so. That is your election and your election alone to make. Or Mr. Donion can make it. It's up to you, sir, and your attorney.

With petitioner and Donion present, the court then discussed jury instructions. During the course of this discussion, Donion moved to withdraw as counsel, and the

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[1] Because the appendix to the petition excerpts parts of the transcript out of chronological order (see Pet. App. 23-37), we refer to the trial transcript by date as necessary to clarify the sequence of events.

court denied his motion. 11/12 Tr. 10. Thereafter, Donion made a motion on petitioner's behalf pertaining to an item of evidence. Petitioner interjected that Donion was no longer representing him. 11/12 Tr. 11. Donion informed the court that petitioner had instructed him not to argue, and he requested a continuance for the purpose of consulting with a colleague. 11/12 Tr. 22-23. The court reiterated that it would not relieve Donion as counsel, that there would be no continuance, and that petitioner himself should decide whether he or Donion would give the closing argument. 11/12 Tr. 23-24. During the same exchange, the court sua sponte revoked petitioner's bail on the ground that petitioner posed a security risk to the court and others. 11/12 Tr. 22-23, 51. The court then granted Donion a five minute recess to confer with petitioner. 11/12 Tr. 24.

After the recess and the government's closing argument, the court repeated to petitioner that he had the right to make a closing argument or to have his attorney do so. 11/12 Tr. 51. Donion informed the court that he had twice conferred with petitioner, that he had told petitioner that a closing argument should be made, and that petitioner had indicated he did not want Donion to make a closing argument and did not wish to make a closing argument himself. 11/12 Tr. 52. Upon repeated questioning by the judge, petitioner stated that he did not intend to make a closing argument, and that he did not want Donion to continue as his attorney. 11/12 Tr. 55. Neither petitioner nor Donion gave a closing argument.

3. The court of appeals affirmed in a unanimous, unpublished opinion. The court found no basis in the record for petitioner's claim that his attorney failed to advise him that he had a right to testify at trial. The court noted that the record in fact indicated that the court granted defense counsel a brief recess to consult with petitioner at the close

of the government's case, after which defense counsel had complained only that it was difficult to "have a rushed conversation in the hall" regarding whether or not petitioner should testify. Pet. App. 8-9. The court of appeals concluded that the district court was not required to advise petitioner that he had a right to testify, and that the district court had not abused its discretion in refusing to grant a longer recess, especially since two continuances had already been granted. Pet. App. 9.

The court of appeals next determined that petitioner had waived his right to make a closing argument. The court first noted that the district court properly allowed petitioner to proceed pro se after it received the motion for a mistrial, although it required defense counsel to remain present in the event that petitioner needed to consult with an attorney. The court then weighed the fact that the district court had specifically told petitioner that he had the constitutional right to counsel, that he had the right to make a closing argument, and that if he remained silent he would waive that right. The court also noted that defense counsel had emphasized the importance of giving a closing argument when counsel sought permission to make a closing argument over petitioner's objection. Under these circumstances, the court determined that the district court did not commit error when it failed to advise petitioner in detail of the dangers of self-representation, as would be required in the case of a defendant who elected to conduct his entire trial pro se. Pet. App. 10-12.

ARGUMENT

1. The court of appeals correctly held that a district court is not required during trial to advise a defendant who is represented by counsel that he has a right to testify or to remain silent. If the defendant does not affirmatively

state that he wishes to testify, a district court has no duty to question whether the waiver is a knowing and voluntary one. *United States* v. *Martinez,* No. 87-1094 (9th Cir. Aug. 23, 1989), slip op. 9885; *Ortega* v. *O'Leary,* 843 F.2d 258, 261 (7th Cir.), cert. denied, 109 S. Ct. 110 (1988); *United States* v. *Bernloehr,* 833 F.2d 749, 751-752 (8th Cir. 1987); *United States* v. *Janoe,* 720 F.2d 1156, 1161 n.9 (10th Cir. 1983), cert. denied, 465 U.S. 1036 (1984). Rather, it is "[t]he accused [who] must act affirmatively" to express his desire to testify. *United States* v. *Systems Architects, Inc.,* 757 F.2d 373, 375 (1st Cir.), cert. denied, 474 U.S. 847 (1985).

While the right to testify is the defendant's own, the decison whether to testify is, in substantial part, a matter of trial strategy. It is a subject that is traditionally discussed by counsel and his client without intervention from the court. See, *e.g., Martinez,* slip op. 9879-9880. In this case, the need for district court intervention was particularly lacking, because defense counsel indicated to the court that he had discussed the issue with petitioner during a recess. Pet. App. 34. The prosecutor likewise informed petitioner on the record that he had a "right to testify." Pet. App. 35. Although petitioner filed motions in his own behalf, he never indicated a desire to testify. The court therefore had no reason to believe that petitioner was unaware of his options. In the absence of a conflict among the circuits on this issue, and in light of the fact that both defense counsel and the prosecutor advised petitioner of his right to testify, further review of this issue is unwarranted.[2]

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[2] The cases relied on by petitioner are inapposite. For instance, in *United States* v. *Plattner,* 330 F.2d 271 (2d Cir. 1964), the court of appeals held that a defendant has a right to appear pro se in a coram nobis proceeding. In *United States ex rel. Wilcox* v. *Johnson,* 555 F.2d 115 (3d Cir. 1977), defense counsel asked to withdraw if the

2. Petitioner also argues (Pet. 9-10) that the district court should have advised him of the perils of self-representation and should have expressly informed him that he had a right to counsel. But the record shows that when petitioner filed a motion for a mistrial on grounds of ineffective assistance of counsel, the district court immediately advised petitioner that he had a right to counsel. 11/12 Tr. 2. In addition, petitioner's motion came at the conclusion of the trial, when only closing arguments remained to be made. At the direction of the court, defense counsel continued to represent petitioner in a stand-by capacity until the conclusion of trial.[3] See generally 11/12 Tr. 2-10. Petitioner himself never asked to substitute new counsel for Donion. The court of appeals correctly determined that under these circumstances and given the district court's and defense counsel's explicit advice to petitioner concerning the only trial decision yet to be made, whether to present a closing argument, the district court

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defendant testified despite her contrary advice. The district court then instructed the defendant that if he testified, counsel's motion to withdraw would be granted and the defendant would be required to represent himself. The court of appeals held that the district court had impermissibly burdened the defendant's right to testify by telling him that he would forfeit his right to counsel if he testified. *Id.* at 119-121. Petitioner was not forced to make such a choice.

[3] Petitioner appears to suggest (Pet. 9-10, 12, 13-14) that the district court erred by requiring defense counsel to remain at counsel table while simultaneously clarifying that petitioner could make the decision whether to give closing argument himself. In fact, the district court's action in requiring Donion to remain available as stand-by counsel to assist petitioner as necessary has repeatedly been recognized as a prudent course for safeguarding the rights of a defendant. See, *e.g.*, *United States* v. *Welty*, 674 F.2d 185, 193 n.5 (3d Cir. 1982); *Wilks* v. *Israel*, 627 F.2d 32, 34-36 (7th Cir. 1980); cf. *United States ex rel. Konigsberg* v. *Vincent*, 526 F.2d 131, 133-134 (2d Cir. 1975), cert. denied, 426 U.S. 937 (1976).

was not required to advise petitioner on the perils of self-representation. Compare *United States* v. *Padilla*, 819 F.2d 952, 958 (10th Cir. 1987) (defendant represented himself for the entire trial, without stand-by counsel); *United States* v. *Welty*, 674 F.2d 185, 189 (3d Cir. 1982) (same).

Finally, petitioner was not denied his right to make a closing argument to the jury, as petitioner suggests (Pet. 10-12). To the contrary, the court repeatedly invited petitioner to "make a closing statement to the jury." 11/12 Tr. 4, 51-55. The court clearly explained that petitioner could choose to give the closing argument himself, to have Donion give the argument, or to make no argument at all. Donion repeatedly explained to petitioner the advisability of making a closing argument. On the record before the judge, the prosecutor, and petitioner, Donion reiterated that advice as well as his willingness to give closing argument. Petitioner instead elected to forgo his opportunity to address the jury. See generally 11/12 Tr. 51-55.[4]

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[4] Nor does petitioner's claim (Pet. 13-14) that the district court was biased against him have merit. Petitioner predicates this claim on the fact that the district court revoked his bail at the close of the government's case. As the court of appeals determined (Pet. App. 12-13), the district court apparently recognized the strength of the government's proof and was concerned that petitioner posed a threat to flee the jurisdiction. Contrary to petitioner's suggestion (Pet. 13-14), nothing in the record indicates that the court conditioned the availability of bail on a decision by petitioner to accept counsel. Rather, the court revoked bail during a colloquy with defense counsel Donion, not petitioner. See Pet. 13. The decision to revoke bail shortly before the verdict was certainly within the court's discretion. In any event, the jury was never informed that petitioner's bail was revoked and petitioner does not allege that he was prejudiced by the decision. Therefore, the revocation of bail would not entitle petitioner to a new trial even if it was erroneous. Cf. *United States* v. *Hasting*, 461 U.S. 499 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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OCTOBER 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—262 203/00547